No. 95-1956

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Petitioners,

v.

STATE OF SOUTH DAKOTA AND CITY OF OACOMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE UPPER SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF CHIPPEWA INDIANS, THE RED LAKE BAND OF CHIPPEWA INDIANS, AND THE SISSETON-WAHPETON SIOUX TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICI CURIAE

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE UPPER SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF CHIPPEWA INDIANS, THE RED LAKE BAND OF CHIPPEWA INDIANS, AND THE SISSETON-WAHPETON SIOUX TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, the above-listed American Indian Tribes file this brief in support of the United States' Petition for a Writ of Certiorari. Letters of consent from counsel for all parties to the proceeding have been filed with the Clerk.

These *amici* are federally recognized Indian Tribes with significant amounts of land held in trust for them by the United States. Additionally, most of the *amici* have either acquired, or are seeking to acquire, land which they intend the United States to take into trust for them to facilitate economic development. The decision of the United States Court of Appeals for the Eighth Circuit in this case has placed in doubt the status of the Tribes' currently held trust lands. Furthermore, the decision has stalled much needed tribal economic development, as the Secretary of the Interior ("Secretary") has halted all fee-to-trust acquisitions in states within the Eighth Circuit since that court's decision. A more detailed description of each *amicus* appears in the Appendix.

SUMMARY OF ARGUMENT

The Eighth Circuit has improperly annulled an Act of Congress, 25 U.S.C. § 465, under the nondelegation doctrine. *State of South Dakota v. U.S. Dept. of Interior*, 69 F.3d 878 (8th Cir. 1995). A judgment by a Court of Appeals that an Act of Congress is unconstitutional is an exceptional event with inevitably serious implications for the relationship of the federal government's coordinate branches. *See United States v. Gainey*, 380 U.S. 63, 65 (1965). Consequently, the Supreme Court has treated such judgments as worthy of the grant of review.

The Eighth Circuit has resurrected a long-dormant constitutional doctrine and used it to invalidate an important and publicly beneficial statute which has survived judicial review periodically throughout its 60-year existence.[1] The Supreme Court must review the Eighth Circuit's judgment both because it erroneously strikes down an important legislative piece of the trust relationship between the federal government and Indian Tribes, and because the Court should clearly define for the Courts of Appeals the present-day limitations on the nondelegation doctrine.

Nationwide uniformity in the application of a Congressional Act is implicated in this Court's decision whether or not to grant review. Resolving circuit conflicts and promoting uniformity in the application of law has

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[1] *See, e.g., United States v. 29 Acres of Land*, 809 F.2d 544 (8th Cir. 1987); *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *State of Florida Dept. of Bus. Reg. v. U.S. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985).

always been an important function of the Supreme Court. *Braxton v. United States*, 500 U.S. 344, 347 (1991). A conflict among the circuits exists here. The United States Court of Appeals for the Eleventh Circuit has held, properly, that the Secretary's decisions to take land into trust under 25 U.S.C. § 465 are not reviewable in federal court. *State of Florida Dept. of Bus. Reg. v. U.S. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985) (hereinafter *State of Florida*). This case especially warrants legal clarification because it involves an historically federal area of law – Indian land policy – which has been long considered a province of legislative, not judicial, discretion. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, by its plain statutory language sets forth a bright line rule governing the discretion delegated to the Secretary. The Secretary may acquire land only "for the purpose of providing land for Indians." 25 U.S.C. § 465. Congress also explicitly provided for "where" it desired the Secretary to acquire land for Indians – "within *or* without existing reservations" – though Congress expressly excluded certain lands and Tribes. *Id.* (Emphasis added.) It is impossible for the Secretary to contravene the intent of Congress in exercising his delegated authority without such behavior being obvious. No statutory bounds can physically stop administrative usurpations of power, but for purposes of the constitutional nondelegation doctrine a statute is only improperly drafted when "it is impossible to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). Such is not the case with 25 U.S.C. § 465.

A second statute is relevant to this Court's decision to grant review. Congress intended to provide exceptions to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 ("APA"), and to reserve to itself the power to define federal subject matter jurisdiction by statute. *See* 5 U.S.C. § 701(a). By holding 25 U.S.C. § 465 unconstitutional on the premise that there is no "law" for judicial review of the Secretary's decisions,[2] the Eighth Circuit erroneously converted the test for determining whether Congress has committed administrative action to agency discretion by law, *Heckler v. Chaney*, 470 U.S. 821 (1985), into a test of whether a statute is unconstitutional as a violation of separation of powers principles. The Court of Appeals' decision has functionally restricted Congress' power to limit judicial review not only by obviating the exceptions to such review contained in 5 U.S.C. § 701(a), but by setting a precedent that legislation which authorizes administrative discretion exempt from review will be highly susceptible to constitutional challenge on separation of powers grounds.

Finally, the Court should grant review to remove the prospect of federal court litigation by local interests throughout the nation adverse to Indian political and economic self-determination. The Indian Reorganization

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[2] The Eighth Circuit held: "[W]hen Congress authorizes the Secretary to acquire land in trust 'for Indians' it has given the agency no 'intelligible principle,' no 'boundaries' by which the public use underlying a particular acquisition may be defined and judicially reviewed." 69 F.3d at 883.

Act has slowly regenerated the nearly decimated territorial and political integrity of American Indian Tribes. The Act is an expression of Congressional intent to exercise the United States' trust relationship with the Indian Tribes to promote Indian self-determination. Its purposes should not be frustrated by state governments and other local interests traditionally insensitive to Indian sovereignty.

Plenary review and reversal by the Supreme Court of the Eighth Circuit's judgment is legally proper and a significantly more efficient use of judicial resources than a remand in light of the recently promulgated Interior Department regulations, 61 Fed. Reg. 18082 (1996), as proposed by the Petitioners as an alternative remedy. A remand would wrongly: (1) open a myriad of new litigation issues (e.g., administrative creation of federal subject matter jurisdiction, sufficiency of regulatory remedies for statutory constitutional infirmity); (2) leave unresolved for an indeterminate period of time a situation where a Congressional statute intended to be applied uniformly throughout the nation remains unconstitutional in only one federal circuit; (3) leave numerous Tribes, including these *amici*, and thousands of Indian people in a state of uncertainty as to the status of their land and their political and economic future; and (4) sanction state and local interference with federal Indian land policy through approval of the Interior Department regulations.

ARGUMENT

I. The Supreme Court Should Review The Judgment Of The Eighth Circuit Because 25 U.S.C. § 465 Is Not An Unconstitutional Delegation Of Legislative Power.

A. The Exceptional Nature And Unprecedented Scope Of The Eighth Circuit's Judgment Warrant Supreme Court Review.

"The grave power of annulling an Act of Congress" is most worthy of Supreme Court review. *Gainey*, 380 U.S. at 65. Here, the Eighth Circuit has held unconstitutional a statute in effect for over 60 years, under a doctrine which this Court has not used to invalidate a statute since the Great Depression.

Congress has long been recognized to have plenary power over Indian affairs, and courts have often acknowledged that there is no federal subject matter jurisdiction over many questions involving federal-state-Indian relations. *See generally, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976). States' dissatisfaction with the ramifications of the Indian Reorganization Act should be voiced in Congress, not in the federal courts. That was the purpose behind Congress' decision to insulate the Secretary from judicial review of his or her trust acquisition decisions under 25 U.S.C. § 465. As a result, review by this Court is especially important in that it will serve to reaffirm not only the constitutionality of the particular statute at issue, 25 U.S.C. § 465, but will also reaffirm the preeminence of legislative authority in federal Indian law.

Additionally, there is a conflict among the federal circuits as to the constitutionality of Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. *See State of Florida*, 768 F.2d at 1256-7 (holding that the Secretary's discretion under the statute was not subject to judicial review, yet was a proper execution of Congressionally delegated discretion). It is patently unfair for Tribes in the Eighth Circuit to have the status of their lands cast into doubt and their sovereignty compromised without the benefit of Supreme Court review. The constitutionality of this widely implemented statute should be uniformly accepted throughout the country. Congress should not be forced to redraft a fee-to-trust acquisition statute because of the decision of one Circuit Court of Appeals.

The Eighth Circuit's decision in this case generates uncertainty about the status of all lands taken into trust for Indians and Tribes since 1934, and could be the undoing of 60 years of recovery of land lost by Indians and Tribes during the allotment era. If this Court does not review the judgment of the Court of Appeals, that judgment will spawn widespread litigation over the retroactive effect of the Eighth Circuit's decision. Further, it will prevent Tribes and individual Indians from expanding their land holdings under the most generally applicable federal law by which lands may be taken into trust for the benefit of Tribes and Indians, and under which Tribes may reclaim or expand their reservations.

B. The Court Should Grant The Petition For A Writ Of Certiorari Because Of The Constitutional Error Of The Appeals Court.

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA" or "Act"), is an articulation of Congress' desire to implement major changes in federal Indian policy, and to rectify the detrimental assimilationist policies of the late 19th and early 20th centuries. Congress made clear in the legislative history of the IRA that its purposes were "to give the Indians the control of their own affairs" and "to rehabilitate the Indian's economic life." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), *quoting* Senator Wheeler, the bill's sponsor, and H. R. Rep. No. 1804, 73rd Cong., 2d Sess. 6 (1934). Thus, the Supreme Court construes the IRA's purposes as promoting tribal "self-government," *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Fisher v. District Court*, 424 U.S. 382 (1976); and "economic development," *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

The Act is broad in scope and sweeping in its effects. An integral component of the Act is the provision in Section 5 for the acquisition of lands to be held in trust for Indians and Indian Tribes. 25 U.S.C. § 465. The restoration and expansion of Indian territorial sovereignty was one of the express goals of Congress in passing the IRA, and Section 5 was Congress' chosen means to that end. Congress delegated to the Secretary the power to execute its mandate that Indian land holdings be restored and expanded. In other words, Congress decided *what* it

wanted done (restoration of Indian political sovereignty and economic self-sufficiency), decided *how* it should be done (trust land acquisition, among other means), and delegated the authority to *get it done* to the Secretary of the Interior. "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out . . . . " *United States v. McGowan*, 302 U.S. 535, 538 (1938). So long as Congress has expressed the manner by which its goals are to be achieved, the statute is sufficiently drawn to satisfy the nondelegation doctrine. " '[T]he criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act." *Mistretta v. United States*, 488 U.S. 361 (1989), *quoting Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Under the nondelegation doctrine, legislation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-373, *quoting American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). Here, the Secretary's discretion is sufficiently bounded. The statute leaves no room for the Secretary to assume arbitrary power.

The plain language of the statute delineates the parameters of the Secretary's authority. Purchases and fee-to-trust conversions must be "for the purpose of providing land for Indians;" land cannot be acquired for the Navajo Indians outside of the boundaries of their reservation; and the statute states that the Secretary "in his discretion" may acquire "any interest in lands . . . within or without existing reservations." 25 U.S.C. § 465.

Congress has specifically asserted that the means (land acquisition) for restoring territorial sovereignty and economic self-sufficiency shall be expansive, and shall permit acquisition within and without existing reservations. The Secretary is not making the policy choice to authorize acquisitions outside of existing reservations. Congress has already expressed that legislative intent.

So long as any purchase or fee-to-trust conversion is for the purpose of providing land for Indians, Congress' intent has been followed. The plain language and legislative history of Section 5 of the IRA establish constitutionally sufficient bounds on Secretarial discretion, drawing a clear line limiting acquisitions to those "for the purpose of providing land for Indians." Because the land either is, or is not, acquired for the purpose of providing land for Indians to use in their best interest, Congress can easily ascertain situations in which the Secretary has abused his or her delegated authority. The proper analysis is not whether an administrative agent can theoretically circumvent the intent of Congress (as implied by the Eighth Circuit's opinion), but whether Congress will be able to determine if and when such an agent exceeds his or her authority under the statute and take appropriate legislative action. *Yakus v. United States*, 321 U.S. 414 (1944).

Furthermore, "[w]e begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts . . . . " *INS v. Chadha*, 462 U.S. 919, 944 (1983). "Interpreting a law enacted by

Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). "When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha, supra*, at 951. The action taken by the Secretary in this case was a constitutionally proper executive decision. This Court should review the Eighth Circuit's improper interference with that action.

C. The Eighth Circuit's Speculation That The Secretary's Acquisitions May Not Be For A Public Purpose Is Erroneous.

Congress intended in passing the Indian Reorganization Act of 1934 to put an end to the destructive and paternalistic Indian policies existing at the time. Accordingly, judicial interpretation of 25 U.S.C. § 465 can only be consistent with Congressional intent if it acknowledges that the power of the Secretary is limited to the acquisition of land and the fee-to-trust conversion, and does not generally extend to considerations of how the land is to be used. Land use determinations are best left to the Tribes in their sovereign capacity. *See Santa Clara Pueblo*, 436 U.S. at 55. The opinion of the Eighth Circuit erroneously suggests that the prospective use of the land is an essential factor in the Secretary's decision to acquire land in trust. 69 F.3d at 882-3. Instead of examining whether the Secretary's use of authority under the IRA was valid in terms of the historical setting of that statute's enactment, the Eighth Circuit examined whether the

Secretary's actions would violate the nondelegation doctrine if he "purchase[d] the Empire State Building in trust for a tribal chieftain as a wedding present," 69 F.3d at 882, or "provide[d] a lake home for a politically faithful tribal officer." *Id.* Under the correct constitutional analysis, such wild speculation upon possible misuses of Secretarial discretion under 25 U.S.C. § 465 cannot justify application of the nondelegation doctrine to invalidate the statute. "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . . " *United States v. Raines*, 362 U.S. 17, 22 (1960).

The "public use" of trust acquisitions under the IRA – which the Eighth Circuit repeatedly asserted was necessary to demonstrate constitutionality – is simply to provide lands for Indians. The protection of Indian tribal sovereignty has been deemed by Congress, and by the courts, as both a public interest and a "national duty." *Nevada v. United States*, 463 U.S. 110, 142 (1983). Land acquisitions under Section 5 of the IRA are necessarily for a "public use" for the very reason that they are for Indians. The particular use for any given parcel of Indian land is, to be consistent with the IRA's policy supporting Indian self-determination, generally for the Tribe, not the Secretary, to determine.

D. The States Should Not Individually Have Influence Over Federal Indian Policy Decisions.

As stated, Congress intended in the IRA to promote tribal sovereignty and economic development. Essential to these goals was the restoration of the Indian Tribes'

drastically depleted land base. Accordingly, the means which Congress employed to accomplish the goals of tribal sovereignty and development was to authorize the Secretary, in his discretion, to acquire lands in trust for Indians and Indian Tribes. In order to be consistent with the statutory goals of tribal sovereignty and development, the decision of the Secretary to put lands in trust must be discretionary and free from state and local interference.

The State of South Dakota in this case, as well as the other states, is not an innocent third party suffering the externalities of a harmful federal policy. "They [the Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Unfortunately, anti-Indian sentiments remain with us today.

It is very difficult to detect any way in which the states are injured when Indian Tribes' trust lands are enlarged by acquisitions under 25 U.S.C. § 465. The Eighth Circuit stated that the removal of the land from state tax rolls, as well as the inapplicability of state zoning laws on Indian land, exemplified the detrimental effect that fee-to-trust acquisitions have on the states. 69 F.3d at 882-3. However, members of Indian Tribes rely on the federal government for most entitlements and benefits, and therefore the taxes collected by the states on Indian-owned land are essentially a windfall to those states. Furthermore, the applicability of state law (e.g. zoning) in Indian country is contrary to the IRA's objectives of tribal sovereignty and economic development.

Whether the state's influence occurs after the land is acquired in trust, or during the Secretary's decision to acquire land in trust, is irrelevant. States do not belong in the decision-making process when Indian lands are in question. That process is a function of the trust and the government-to-government relationships amomg Indians, Indian Tribes, and the United States.

II. The Supreme Court Should Review The Judgment Of The Eighth Circuit Because Of Its Disregard Of Congressional Intent Expressed In 5 U.S.C. § 701(a).

The Eighth Circuit failed to apply properly two distinct legal doctrines. First, it misapplied the nondelegation doctrine and ignored the intelligible principles governing the delegation of power to the Secretary that exist in the plain language of 25 U.S.C. § 465. In so doing, the Court of Appeals suggested that any statute which delegates administrative authority and commits such authority to "agency discretion by law," *Heckler v. Chaney*, 470 U.S. 821 (1985), carries with it the seeds of constitutional defect. The Eighth Circuit inappropriately intermingled the statutory test for determining whether action is committed to agency discretion by law with the test for determining whether a statute violates the constitutional nondelegation doctrine.

The fact that the "intelligible principles" in 25 U.S.C. § 465 make it "possible to ascertain whether the will of Congress has been obeyed," *Yakus*, 321 U.S. at 426, does not subject the Secretary's decisions under that statute to judicial review. The Eleventh Circuit in *State of Florida*, 768 F.2d 1248, recognized this fact, and the Eighth Circuit

in this case acknowledged the Secretary's then-opinion that this was "agency action committed to discretion by law," not subject to judicial review. 69 F.3d at 880.

25 U.S.C. § 465 places the trust decision explicitly in the Secretary's "discretion." Whether one treats the delegating language as an express bar to judicial review or as a commitment of action to agency discretion by law, the Administrative Procedure Act, by its terms in 5 U.S.C. § 701(a), encompasses no cause of action to review the Secretary's exercise of discretion. The Eleventh Circuit further noted that the relevant Interior Department regulations, 25 CFR Part 151, are "guides for the exercise of the Secretary's discretion" but not " 'law' that a reviewing court can apply" for the purposes of judicial review. *State of Florida*, 768 F.2d at 1256.

The Eighth Circuit in its opinion implied, however, that the Secretary's construction of the statute – that there was no "law" to apply and therefore it committed action to agency discretion – was contrary to Congressional intent. 69 F.3d at 883. The court improperly applied the Secretary's construction of the reviewability of his discretion under the statute to its nondelegation analysis. *Id.* at 884. The Secretary's interpretation of his delegated authority and of the unavailability of judicial review was consistent with Congressional intent. The action he undertook that instigated this litigation – acquiring land in trust for the Lower Brule Sioux Tribe – was well within the bounds of his discretion as expressed in the statute. Likewise, his assertion to the district court that his decision was not subject to judicial review was perfectly in accordance with Congressional intent as well, as expressed in the plain language of 25 U.S.C. § 465. The

Eleventh Circuit – and earlier, the Secretary – properly viewed the regulations in 25 CFR Part 151 as guidelines to aid the Secretary in establishing uniformity among his decisions under the statute, and not as judicially enforceable rules:

> The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor . . . . The factors listed in the regulation are not the kind of legal principles courts are familiar with applying to a particular case.

State of Florida, 768 F.2d at 1256-7.

The language chosen by Congress in 25 U.S.C. § 465 and 5 U.S.C. § 701(a) precludes judicial review of the Secretary's decision to take land into trust for Indians. There is no federal subject matter jurisdiction over the Respondents' claims. Nonetheless, the Eighth Circuit largely based its decision that 25 U.S.C. § 465 was unconstitutional on the fact that the Secretary asserted that there could be no judicial review of his decision to take land into trust for Indians. In so doing the court failed to adhere to a recent decision of this Court which held that the provision of judicial review is not a necessary condition for a statute to be constitutional. *Touby v. United States*, 500 U.S. 160, 168 (1991). The appellate court believed that any delegation of authority unaccompanied by judicial review required a "close look," and proceeded to use the Secretary's proper assertion that judicial review was precluded as grounds for striking down the statute under the nondelegation doctrine.

Premising a finding of unconstitutionality on a lack of judicial review frustrates the purposes of 5 U.S.C.

§ 701(a) and calls into doubt whether Congress can ever employ the exceptions provided in that section of the Administrative Procedure Act. The express purpose of that section's exceptions to the succeeding statutory language was to allow Congress to retain the power to limit judicial review in certain relatively rare circumstances, such as the exercise of the United States' trust responsibility in acquiring land for Indians. The Eighth Circuit's judgment has frustrated the intent of the APA as well as the intent of the IRA. As long as Congress meets the minimum threshold of expressly clarifying the purpose and limits of the power delegated to an agency, then the presence or absence of judicial review should not be used to defeat an otherwise constitutional statute.

III. The Supreme Court Should Grant Plenary Review Of The Eighth Circuit's Judgment.

This Court should grant the petition for writ of certiorari, vacate the judgment of the Eighth Circuit, and affirm the judgment of the district court on the grounds that there is no federal subject matter jurisdiction over Respondents' claims. To remand this case to the district court or the Secretary, as the Petitioners suggest in the alternative, would not resolve the constitutional questions involved. The question squarely raised by this case is whether the statute itself violates the nondelegation doctrine, not whether the Interior Department regulations render it constitutional. A regulatory fix cannot, *post hoc*, remedy what the Eighth Circuit perceived as a constitutional flaw. The new regulations, 61 Fed. Reg. 18082 (1996), contravene Congress' intent to commit acquisition

decisions to the Secretary's discretion, and they purport to create federal subject matter jurisdiction without the requisite Congressional mandate. A remand to allow more litigation under the new regulations would compound, not cure, the Eighth Circuit's error.

A remand would also be an inefficient use of judicial and administrative resources. No purpose is served by additional litigation over a constitutional statute which by its terms and those of the Administrative Procedure Act precludes judicial review of the Secretary's fee-to-trust decisions.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant plenary review of the appellate court's decision and decline to remand the case in light of the recently promulgated regulations of the Interior Department. The Supreme Court should then vacate the Eighth Circuit's judgment and affirm the judgment of the district court on the grounds that the Secretary's discretionary decision to

take land into trust for Indians under 25 U.S.C. § 465 is not subject to judicial review.

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APPENDIX

The Shakopee Mdewakanton Sioux (Dakota) Community

The Shakopee Mdewakanton Sioux (Dakota) Community is a federally recognized Indian Tribe located near the Twin Cities in Minnesota. It was organized pursuant to the Indian Reorganization Act through a Constitution approved by the Secretary of the Interior.

Originally, the Shakopee Community consisted of only a few hundred acres. Since its organization in 1969, however, the Shakopee Community has more than doubled its original land holdings by purchasing land and having it put into trust by the United States. The Shakopee Community currently has a request for trust acquisition for five hundred acres pending with the Bureau of Indian Affairs, which has been put on hold because of the Eighth Circuit's decision in this case. The appeals court's decision has directly affected the Shakopee Community and its ability to expand its land holdings.

The Upper Sioux Community

The Upper Sioux Community is a federally recognized Indian Tribe located near Granite Falls, Minnesota. On or about October 6, 1938, pursuant to 25 U.S.C. § 465, the United States government placed in trust for the use and benefit of the Upper Sioux Community approximately 740 acres in Yellow Medicine County in the State of Minnesota, of which only 80 acres were above the flood plain of the Minnesota River.

The Upper Sioux Community has only recently achieved the means to acquire additional land in order to

satisfy its members' demands for residential housing. The Eighth Circuit's decision has seriously disrupted the Upper Sioux Community's plan to place in trust acquired land above the Minnesota River flood plain.

Grand Portage Band of Chippewa

The Grand Portage Band of Chippewa is a federally recognized Indian Tribe and a member of the Minnesota Chippewa Tribe. The Band's reservation land base was originally defined by the Treaty of 1854, but since that time the Band has procured various other tracts of land, including islands in Lake Superior, pursuant to the IRA and the Executive Order of March 21, 1871. Presently, approximately 85% of all land within the boundaries of the Grand Portage Reservation is held in trust by the United States for the benefit of the Tribe, the Band or individual Indians. The Eighth Circuit's decision in this case could adversely impact the status of the Band's land holdings.

Red Lake Band of Chippewa Indians

The Red Lake Band of Chippewa Indians is a federally recognized Indian Tribe located in north central Minnesota, with a tribal population of over 8,000 members. The Red Lake Band is not organized under the IRA; however, the fee-to-trust provisions found in 25 U.S.C. § 465 have been used by the Band to place land into trust on numerous occasions. Over 99% of the land within the exterior boundaries of the Band's reservation is held in trust in common by members of the Band. The Eighth

Circuit's decision in this case has far-reaching ramifications on the Band's past and future efforts at putting land into trust. The immediate result of the appellate court's ruling is that pending fee-to-trust transactions are being held up and several of the Band's land initiatives are in suspension.

The Sisseton-Wahpeton Sioux Tribe

The Sisseton-Wahpeton Sioux Tribe is a federally recognized Indian Tribe located in northeastern South Dakota, with a tribal population of over 10,000 members. The Tribe is situated on the Lake Traverse Reservation, as established by the Treaty of February 19, 1867.

Although the Sisseton-Wahpeton Sioux Tribe declined reorganization under the IRA pursuant to 25 U.S.C. § 478, the provisions of 25 U.S.C. § 465 are nonetheless made applicable to the Tribe through the 1983 enactment of the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.* Because the Sisseton-Wahpeton Sioux Tribe has, over the past several years, reacquired and placed into trust status acreage located within the original boundaries of the Lake Traverse Reservation, the status of this trust acreage is left in doubt based upon the Eighth Circuit's decision in this case.